

## CHAPTER 39

### TEMPORARY RELEASE PROGRAMS\*

#### A. Introduction

If you are a New York State prisoner, this Chapter will help you understand various temporary release programs for which you might be eligible. In general, this Chapter tells you about the different types of temporary release programs in New York State, summarizes the application procedures you must follow, and explains what rights you have regarding temporary release programs. Part B explains the temporary release programs available. Part C addresses eligibility requirements. Part D discusses how to apply for temporary release programs. Part E concerns what you must do if your temporary release request is either denied or revoked. Finally, Part F describes the features of state and federal temporary release programs that the Second Chance Act of 2007 changed. Previous editions of the *JLM* had a special chapter for New York City temporary release programs, but as of January 1, 1995, New York City has stopped all of its temporary release programs. Therefore, this Chapter deals only with New York State provisions.

New York State temporary release programs allow prisoners to leave the prison for short periods of time before they are paroled or serve their full sentence. There are several programs. Each program has a specific purpose and there are separate rules to qualify. The laws authorizing the State Department of Corrections and Community Supervision to establish release programs can be found in the New York Correction Law (N.Y. Correct. Law) Sections 851 to 861 and 870 to 879. Regulations establishing the specific programs can be found in the Official Compilation of Codes, Rules and Regulations of the State of New York (N.Y. Comp. Codes R. & Regs.), title 7, Chapter XII (parts 1900–04).

The superintendent of each New York State correctional institution and a Temporary Release Committee (“TRC”) administer the day-to-day operations of the various programs. The TRC is made up of a chairperson and two staff members, representing the parole, program services, and security departments. The superintendent nominates the TRC members and three alternates, and the Commissioner of Corrections approves them. The TRC must meet at least once a week to consider temporary release applications.

#### B. Overview of Temporary Release Programs

First, you should know that not all facilities have temporary release programs. Those facilities that do offer temporary release may not have every type of program. You should ask at your facility to see what programs it offers. As will be explained in detail later, you may be transferred to another facility in order to take part in a temporary release program.<sup>1</sup>

There are both short-term release programs and continuous temporary release programs. The short-term programs allow prisoners to leave the facility for only a specified period of time (often for seven days or less) and only for certain narrow purposes. The continuous temporary release programs allow prisoners to leave the facility for up to fourteen hours per day until the purpose of the program has been fulfilled.

You should also be aware that getting into these programs is hard, depending on which program you are interested in and your particular criminal history. Over the past ten years, the percentage of applicants accepted into all of the temporary release programs in the state has dropped from about twenty to under ten percent.<sup>2</sup> Also, the total number of participants in these programs has dropped every year since 1998, when there were 11,658 prisoners participating in these programs.<sup>3</sup> In 2010, the number was just 1,910.<sup>4</sup>

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\* This Chapter was written by Anna Moody based in part on a previous version by Judith M. Shampanier. Special thanks to Bill Gibney of The Legal Society of New York City, Special Litigation Unit for reviewing this Chapter.

1. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2(a).

2. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 14 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

3. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 14 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

4. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 14 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

## 1. Short-Term Temporary Release Programs

There are three types of short-term temporary release programs: (a) leaves of absence, (b) community service programs, and (c) furloughs. Participation in a community service program may be short-term or continuous.

### (a) Leaves of Absence

Leaves of absence are different from other release programs because you do not need to be within two years of being eligible for release on parole in order to qualify. You may be granted a leave of absence to leave the facility for a certain period of time for one of three specific purposes:

- (1) If death may happen soon, you may leave to visit your spouse, child, brother, sister, grandchild, parent (natural or legally adoptive), grandparent, or ancestral aunt or uncle during their last illness;
- (2) To attend a funeral of such individual; or
- (3) To receive surgery or to receive medical or dental treatment not available at the facility, but only if it is absolutely necessary to your health and well-being.<sup>5</sup>

For the third type of leave of absence, the Commissioner or his or her representative must approve the leave.<sup>6</sup> This approval depends on your criminal history and your institutional behavior. The Department of Corrections and Community Supervision uses a point system to determine your eligibility for programs. The point system is discussed in detail in Part D(2)(a) below. You will need thirty points to participate in a short-term program and thirty-two points to participate in a continuous program. Even if you have the necessary number of points, you still may not be allowed to participate, but you must be considered. Leaves of absence are available at all facilities in the state except shock incarceration facilities.<sup>7</sup> On the other hand, it is important to be aware that leaves are fairly rare, mostly because very few prisoners apply for them. In 2010, fifteen leaves were granted out of twenty-seven applications.<sup>8</sup>

One deathbed visit may be granted for each terminally ill relative. If you have already had one escorted visit, you will not get another visit to the same person. The facility will verify the facts of your case, and in doing so, may contact the patient's doctor or funeral home director. Once the TRC is sure you have a relative who is ill or deceased, it will make a decision. If it approves your leave, the superintendent must also do so in order for you to get the leave of absence. You will be granted only the minimum length of time necessary to accomplish the purpose of the leave. Out-of-state leaves of absence will be granted only with the Commissioner's approval.<sup>9</sup>

If you have applied for a medical or dental leave, you must be willing to get such treatment nearby and from a doctor selected by the institution. You must get TRC Form 4188 filled out and signed by the facility Health Services Director.<sup>10</sup> All medical or dental leaves longer than one day, even when you are not a Central Review case, require approval from the Director of Temporary Release Programs.<sup>11</sup> See Part D(2)(c) of this Chapter for an explanation of Central Review.

### (b) Community Service Programs

Under the community service program, eligible prisoners may get the privilege of leaving the facility for up to fourteen hours on any day in order to volunteer at nonprofit organizations or public agencies (for example, hospitals or charities). These organizations must have an established volunteer program with a definite job description outlining the duties and responsibilities of a volunteer. You may not fill a position ordinarily taken by a paid worker. Participants in a volunteer work program will receive an allowance from

5. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a).

6. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a)(2).

7. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 6 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

8. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 17 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

9. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a)(1)(i)(e).

10. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a)(2)(v)(a).

11. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a)(2)(iv).

the facility's Temporary Release Program appropriations.<sup>12</sup> You may also be allowed to participate in religious services and athletic or cultural events if they are not available at your facility.<sup>13</sup>

### (c) Furloughs

A furlough program allows eligible prisoners to leave an institution for up to seven days in order to:

- (1) Solve family problems or maintain family ties,
- (2) Attend a short educational course,
- (3) Look for a job, or
- (4) Seek post-release housing.<sup>14</sup>

Thus, if you can convince the TRC that you need to see your family (for example, because you have children, or because your parents are going through a divorce), you may be allowed to take a furlough only for the narrow purpose of seeing your family. You may not take an out-of-state furlough.<sup>15</sup>

Furloughs are available at all facilities throughout the state except for shock incarceration locations.<sup>16</sup> Be aware, though, that furloughs are rarely granted and a hundred percent of applications have been rejected in some years.<sup>17</sup> In 2013, there were 34 applications for furlough, none of which were granted.<sup>18</sup>

General confinement prisoners who have been accepted for previous furloughs may apply subject to these limitations:

- (1) You cannot take more than twenty-eight days in any furlough year,
- (2) You cannot take more than fourteen days in the first six months of any furlough year, and
- (3) You cannot take more than seven days in any twenty-eight day period.
- (4) A furlough year begins on the day you take your first furlough and ends 365 days later.
- (5) No furlough can be longer than seven days.

If you apply and do not fit into this timing, the TRC may hold onto your application.<sup>19</sup> Please note that if you want to take a furlough during a holiday season, you must submit your application at a time set by the Director of Temporary Release at your facility.<sup>20</sup>

### (i) Family-Tie Furlough

If you are applying for a family-tie furlough, you must go to an approved residence. This must be the home of a relative by blood or legal adoption, a legal guardian, or a spouse. If your family lives out-of-state, you may request that the TRC and Central Office approve a different in-state location.<sup>21</sup> That is, you will still be allowed to meet with your family to maintain family ties even if your family lives out-of-state, but the meeting must take place in the state in which you are imprisoned and at an approved residence.

### (ii) Job-Search and Post-Release Housing Furloughs

The job-search furlough and the post-release housing furlough are available to prisoners preparing for release from prison. There is no pre-approved residence requirement for a one-day furlough, although for a longer furlough you must meet the same residence requirements (home of a relative by blood or legal adoption) as for the family-tie furlough, or if that is not available, go to a legal and verifiable residence.<sup>22</sup>

12. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(b)(1)–(3).

13. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(b)(6)–(7).

14. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(c).

15. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(c).

16. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 6 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

17. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 17 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

18. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 17 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

19. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.3(c)(2)–(3).

20. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(c)(3)(ii).

21. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(c)(2)(i)(a)–(b).

22. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(c)(2)(ii)–(iii).

### (iii) Short Educational/Vocational Training Course Furlough

The short educational/vocational training course furlough program serves one of two purposes:

- (1) One-day rehabilitation therapy in order to provide the prisoner with counseling and therapy for problems such as drug, alcohol, or gambling addictions; or
- (2) An educational furlough in order to take an entrance exam or attend an educational conference, short course, or seminar.

This program can be for one day or for an extended period of time. Educational furloughs require Central Office approval.<sup>23</sup>

All furlough approvals will last continuously unless the decision says that the furlough is for a specific period of time. After the first furlough, the superintendent will schedule later requests as long as the TRC says that you are still qualified. If you are only approved for a furlough, though, you are not approved for any other temporary release program.<sup>24</sup>

If you have a pending transfer to a work release or educational release program facility, you will be eligible for a furlough from the transferring facility after Central Office approval. Remember that furlough approval, like approval for other temporary release programs, is entirely up to the prison officials. If the Commissioner of Corrections approves you for a work or educational furlough, the superintendent of the prison facility can postpone the furlough in the interest of “the efficient and orderly operation of the transferring facility.”<sup>25</sup>

## 2. Short-Term Temporary Release Procedures

As soon as you are approved for participation in a short-term temporary release program, you will be notified so that you may make the arrangements necessary to complete the program. If the TRC feels that there is not enough information about your requested residence, the individuals with whom you will be staying, or any other part of your case, it will investigate the problem. If the result of the investigation is negative, you will be notified and you may be denied that residence.<sup>26</sup>

You will usually be allowed to bring no more than \$100 over and above your transportation costs on a short-term release. If you cannot afford transportation, your release may be postponed until you have the money. If you are leaving the facility on short-term release, you must pay for the entire trip. In exceptional cases, however, the facility may grant you an advance in order to cover the costs of the trip.<sup>27</sup>

You will receive a photo identification card to carry for the duration of your temporary release. This card must be with you at all times when you are out of the facility.<sup>28</sup> You will also be required to sign a “Memorandum of Agreement” before you leave, which lists the rules and regulations that you must follow while on temporary release, as well as any special conditions that apply specifically to you.<sup>29</sup> You will not be allowed to return to the facility with any item that you did not take out with you.<sup>30</sup> The law requires that you be supervised by a parole officer during your short-term temporary release.<sup>31</sup>

## 3. Continuous Temporary Release Programs

There are four different types of continuous temporary release programs. These releases allow eligible and approved prisoners to leave prison grounds for up to fourteen hours a day on a continuous basis. They are granted to let prisoners work, volunteer for community service, get educational or vocational training, or attend an industrial training leave program. If the Central Office approves you for any long-term temporary release program, that approval also implies that you are approved for all other temporary release programs at the discretion of the TRC and the facility superintendent. There are no out-of-state continuous release

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23. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(c)(2)(iv).

24. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 1901.1(d)(1), (9).

25. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(d)(7)–(8). See Part D(2)(c) of this Chapter for more information.

26. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.2(a)(2).

27. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.2(a)(6).

28. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.2(a)(7)(i).

29. For a copy of a typical Memorandum of Agreement, see N.Y. Comp. Codes R. & Regs. tit. 7, § 1902.1.

30. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.2(a)(7)(ii).

31. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.2(b)(2)(i).

programs.<sup>32</sup> As stated before, not every institution offers each release program. Where programs are offered, the number of available spots may be limited. You will need to check this at your facility.

#### (a) Work Release

The work release program allows an eligible prisoner to leave a facility for up to fourteen hours in a day to work, get on-the-job training, or do any activity that will make employment possible, like shopping for work clothes. One of the purposes of work release is to make it possible for you to accumulate savings prior to your release on parole, in the hope that this will make your return to the community easier.

Prisoners are expected to secure their own employment. Most prisoners can do this fairly quickly. For example, prisoners at the Rochester Correctional Facility have gotten jobs over the years with hundreds of different employers in the area, including Xerox, Kodak, the University of Rochester, and Strong Memorial Hospital.<sup>33</sup> In addition to their full working schedules, those prisoners are responsible for cleaning their rooms and the facility's communal areas. Dinner is provided every night at the Rochester facility, but prisoners prepare their own breakfasts and lunches and do their own laundry.

Work release is by far the most popular temporary release program, both in the number of applications and in the number of prisoners who are approved. Work release figures from 2013 show 21,095 applications were received, and 700 prisoners were approved.<sup>34</sup> To participate in this program, you must be physically, mentally, and emotionally capable of finding and keeping a steady job, and must satisfy the other temporary release eligibility requirements outlined below in Part C.<sup>35</sup>

#### (b) Educational Leave

The educational leave program allows a prisoner to leave a facility for up to fourteen hours in any day to attend school or vocational training. Before you can apply for an academic college release program in New York City, Long Island, Westchester, Rockland, Suffolk, or Nassau Counties, you must have completed six semester hours of college level study with a passing grade and have applied to a college within commuting distance of a participating facility. However, to participate in an educational release program from an upstate correctional facility, or in a vocational training program upstate or in the New York metropolitan area, you do not have to complete six credit hours of college level study. For either program, you must submit your temporary release application to the facility TRC by July for the fall semester, November for the spring semester, and April for the summer semester.

Educational leave is one of the rarest of the temporary release programs. In 2013, for example, only six prisoners applied, and not a single prisoner was approved.<sup>36</sup> This should not discourage you from applying if you are qualified, but you should be aware that it may be difficult to get.

If you are approved to participate in an educational release program and are transferred to a correctional facility in New York City in order to take part in such a program, but your application for admission is rejected by the college, you will be considered approved for the work release program as long as you are physically capable of keeping a job.<sup>37</sup>

#### (c) Community Services Program

As described in Part B(1)(b) above, the community services program allows prisoners to leave the facility for up to fourteen hours a day in order to participate in religious services, athletic events, volunteer work, or cultural events not offered at the facility. An example of the volunteer work that is available is the work done by prisoners in Syracuse. They commute to the fairgrounds there and work with the staff to maintain

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32. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.1.

33. Reocities, Rochester: First Among Work Release Centers, *available at* <http://www.reocities.com/motorcity/downs/3548/facility/rochester.html> (last visited Feb. 6, 2017).

34. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 17 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

35. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.1(a).

36. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 17 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

37. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.1(b).

the grounds and repair the buildings.<sup>38</sup> The advantage of participating in the continuous community services program is that once accepted, you will not have to reapply in order to get released. That is, so long as your disciplinary record remains the same, you will be able to leave your facility for up to fourteen hours a day, week after week. The short-term program has fewer benefits (for example, you can only leave the facility for a maximum of seven days at a time before reapplying for temporary release privileges), but, as discussed in Part C below, it has less strict requirements.<sup>39</sup> The reality is, however, that the short-term version of this program is almost never used. Statistics for 2013 show that not a single prisoner applied for it, although 52 prisoners did apply for the continuous version in that year. Seven of those applicants were approved.<sup>40</sup>

#### (d) Industrial Training Leave

This program allows an eligible prisoner to leave the facility for up to fourteen hours in any day to participate in an industrial training program. An industrial training program assigns a prisoner to the supervision of a federal, state, county, or local government employee, who is not a corrections officer, and allows the prisoner to help that employee in performing his job.<sup>41</sup> To qualify for this program, you must have either a high school diploma or a GED.<sup>42</sup>

Currently the only locations with industrial training programs are the Hudson Correctional Facility.<sup>43</sup> The prisoners participating in this program work at the DOCS warehouses located in Menands.<sup>44</sup> Prisoners accepted into this program will work and learn how to take inventory, complete bills of lading, operate forklifts, and repair furniture. Others will work in the office learning business procedures.<sup>45</sup> This allows the prisoners to develop good work habits, to acquire job skills and become familiar with the distribution industry that can be a great help after release from prison.<sup>46</sup>

### 4. Continuous Temporary Release Procedures

In order to qualify for a continuous temporary release, you must first apply and be approved at the facility level. If you are approved, you may be transferred to a different correctional facility that has the temporary release program for which you applied. When you arrive at the new facility, you will be interviewed by a corrections counselor and a temporary release parole officer. You will participate in an orientation program that will introduce you to the facility and to the program.<sup>47</sup>

If you have no money when you arrive at the program facility, prison administrators may give you part of your salary in advance. You can use the advanced money to cover the costs of your job search, tuition or related expenses, transportation costs for a weekend furlough, or an emergency leave of absence. You must repay the advanced money as soon as possible. Prisoners in a work release program will earn money. All

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38. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 9 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

39. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.1(c).

40. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 17 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

41. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.1(d).

42. New York State Department of Corrections and Community Supervision, Industrial Training Program, *available at* <http://www.doccs.ny.gov/ProgramServices/industries.html> (last visited Feb. 6, 2017).

43. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 9 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

44. New York State Department of Corrections and Community Supervision, Industrial Training Program, *available at* <http://www.doccs.ny.gov/ProgramServices/industries.html> (last visited February 6, 2017); *see also* Corcraft Products, *available at* <http://www.corcraft.org/> (last visited Feb. 6, 2017).

45. New York State Department of Corrections and Community Supervision, Industrial Training Program, *available at* <http://www.doccs.ny.gov/ProgramServices/industries.html> (last visited Feb. 6, 2017); *see also* New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 9 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

46. New York State Department of Corrections and Community Supervision, Temporary Release Program: 2013 Annual Report 9 (2014), *available at* <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf> (last visited Feb. 6, 2017).

47. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2(b)(2).

other prisoners may receive an allowance, or the equivalent, provided they perform their institutional duties well. All the money you make while you are in a continuous temporary release program must be turned over to the facility processing officer to be deposited into your account. If you are in a work or educational release program, you must pay for all expenses related to participation in that program. If you do not have money or other educational funds (like a scholarship), you will not be allowed to enroll in college.<sup>48</sup>

Just as with short-term temporary release programs, you must have a photo identification card and a signed "Memorandum of Agreement." The identification card must be carried with you at all times.<sup>49</sup>

There are many restrictions on the types of jobs that you may take. If you are accepted into a work release program, the facility will help you determine what employment you may accept. If necessary, you may be granted an eight-hour, non-continuous job search furlough. If you have not found employment within six weeks after orientation and the TRC decides you are unwilling or unable to secure a job, you may be removed from the program.<sup>50</sup>

### 5. Family Reunion Program

If you do not qualify for either the leave of absence for funeral/deathbed visits, or the furlough family-ties programs, you may still have another chance to visit your family. The Family Reunion Program allows some prisoners and their families to meet privately for an extended period of time.<sup>51</sup> This program has nothing to do with the temporary release program. It is part of visitation and is only available to you if you are *not* eligible for the temporary release program. You may apply if your location offers the program.<sup>52</sup> Twenty-two locations currently offer the program: Albion, Attica, Auburn, Bedford Hills, Clinton, Collins, Eastern, Elmira, Fishkill, Great Meadow, Green Haven, Shawangunk, Sing Sing, Sullivan, Taconic (at Bedford Hills), Wallkill, Wende, Washington, (at Great Meadow), Woodbourne (at Sullivan), Downstate Cadre (at Fishkill and Green Haven), Southport Cadre (at Elmira), and Ulster Cadre (at Eastern).<sup>53</sup>

The rules state that to be eligible, you:

- (1) Must have been in the department's custody for at least six months, must be living for at least thirty days at the facility that offers the program;<sup>54</sup> and
- (2) Must have shown good behavior, and have not recently had any major bad behavior problems, nor a long history of bad behavior.<sup>55</sup>

You must also maintain good behavior while applying and visiting.<sup>56</sup> Further, you are not eligible for the Family Reunion Program if you:

- (1) Are eligible for the Temporary Release Program, unless your application for temporary release has been denied;
- (2) Require more security than allowed at the program site;
- (3) Are assigned to special housing for bad behavior; or
- (4) Have violated the Family Reunion Program rules within six months from the date of the bad behavior hearing finding.<sup>57</sup>

Applicants who have violated Family Reunion Program rules in the past must be approved and reviewed by the Central Office.<sup>58</sup> For more information about which family members may participate in the program, the procedures for applying, and the instructions for visiting, please see N.Y. Comp. Codes R. & Regs. Tit. 7, § 220.

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48. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2(f)(1)(ii).

49. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2(c)(8).

50. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2(d)(2)(vi).

51. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.1.

52. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.2.

53. New York State Department of Corrections and Community Supervision Family Reunion Program, *available* at <http://www.doccs.ny.gov/ProgramServices/ministerial.html#frp> (last visited Feb. 6, 2017).

54. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.2(a)(1).

55. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.2(a)(2).

56. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.2(a)(2).

57. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.2(b)(1)–(4).

58. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.2(b)(4).

### C. Eligibility Requirements for Temporary Release Programs

If you were *ever* convicted of any of the following offenses, you are ineligible for temporary release:

- (1) Escape—first, second, or third degree;
- (2) Absconding—first or second degree; and
- (3) Absconding from furlough or from a community treatment facility.<sup>59</sup>

If you are *currently* serving a sentence for one of these crimes, you are ineligible for temporary release:

- (1) Criminally negligent homicide;
- (2) Vehicular manslaughter—first or second degree;
- (3) Manslaughter—first or second degree;
- (4) Aggravated manslaughter—first or second degree;
- (5) Murder—first or second degree;
- (6) Aggravated murder;
- (7) Abortion—first or second degree;
- (8) Self-abortion—first or second degree;
- (9) Issuing abortifacient articles;
- (10) Sexual misconduct;
- (11) Rape—first, second, or third degree;
- (12) Criminal sexual act—first, second, or third degree;
- (13) Forcible touching;
- (14) Persistent sexual abuse;
- (15) Sexual abuse—first, second, or third degree;
- (16) Aggravated sexual abuse—first, second, third, or fourth degree;
- (17) Course of sexual conduct against a child—first or second degree;
- (18) Female genital mutilation;
- (19) Facilitating a sex offense with a controlled substance;
- (20) Sexually motivated felony;
- (21) Predatory sexual assault—also against a child;
- (22) Aggravated harassment of an employee by an inmate;
- (23) Incest—first, second, or third degree;
- (24) Use of a child in a sexual performance;
- (25) Promoting or possessing an obscene sexual performance by a child;
- (26) Promoting or possessing a sexual performance by a child;
- (27) Attempting to get or providing support for an act of terrorism—first or second degree;
- (28) Making a terrorism threat;
- (29) Committing an act of terrorism;
- (30) Hindering prosecution of terrorism—first or second degree;
- (31) Criminal possession of a chemical weapon or biological weapon—first, second, or third degree;
- (32) Criminal use of a chemical weapon or biological weapon—first, second, or third degree<sup>60</sup>

Also, if your conviction was for a crime that involved either the use or threatened use of a deadly weapon or a dangerous instrument, or the crime involved causing someone serious physical injury, you will not be eligible for temporary release.<sup>61</sup>

You are eligible to participate in temporary release programs (short-term or continuous) only if you are within twenty-four months of your next scheduled appearance before the parole board.<sup>62</sup> If you have been held by the parole board, you must be within twenty-four months of your parole date (except for leaves of

59. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(2)(i). “Absconding” refers to failing to report to your parole officer or moving without informing your parole officer.

60. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(2)(ii).

61. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(1)(ii) has been amended in conformity with Executive Order 5.1, which was issued by Governor Pataki in December 1995. As this has already been challenged and upheld by the N.Y. Court of Appeals in *Dorst v. Pataki*, 90 N.Y.2d 696, 699, 687 N.E.2d 1348, 1349, 665 N.Y.S.2d 65, 66 (1997), no further challenges to it are expected.

62. N.Y. Correct. Law § 851(2) (McKinney 2003).

absence).<sup>63</sup> If you are serving an indeterminate sentence, you will be considered eligible for temporary release if you have served the minimum period of imprisonment set by either the court or the parole board.<sup>64</sup>

You will not be eligible for a temporary release program if:

- (1) You have an outstanding warrant;<sup>65</sup>
- (2) You have been committed to a local, state, out-of-state, or federal jurisdiction currently or in the past;<sup>66</sup>
- (3) You have an outstanding charge;<sup>67</sup>
- (4) You are the subject of a Bureau of Immigration and Customs Enforcement (ICE)<sup>68</sup> deportation proceeding;<sup>69</sup>
- (5) You were eligible for the shock incarceration program and either chose not to participate or failed to complete it;<sup>70</sup> or
- (6) In the eight weeks before your application, you engaged in particularly bad behavior.<sup>71</sup>

Repeat parole violators (“RPVs”) must serve at least six months after their most recent return before they can apply for temporary release.<sup>72</sup>

Each prisoner receives a certain number of points depending on his criminal history and institutional behavior. You must meet the minimum number of points needed for any program you want to do. The scoring system will be explained in Part D(2)(a) below. You will not have to worry about how many points you have if you were only convicted as a youthful offender. Youthful offenders are treated as if they have scored the right number of points that each program needs. If you are a youthful offender, you will simply appear before the TRC. They will then make the decision.<sup>73</sup>

Temporary release is a privilege. Approval can be taken away at any time. To remain approved, you must show continuing good behavior from the time conditional approval is given until the time you begin the period of temporary release. Conditional approval will be taken away if:

- (1) After the conditional approval, you are found guilty at a disciplinary or superintendent’s hearing;

63. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(1)(i).

64. N.Y. Correct. Law § 851(2) (McKinney 2003).

65. Any of the following warrants (from any jurisdiction) will make you ineligible: (1) family court warrant (except alimony, child support, or paternity); (2) out-of-state or federal criminal detainer; (3) felony arrest warrant for a crime which is not barred by the statute of limitations, as provided by N.Y. Crim. Proc. Law, § 30.10; (4) misdemeanor arrest warrant for a crime committed on or after your current conviction, and which is not barred by the statute of limitations, as provided by N.Y. Crim. Proc. Law, § 30.10; (5) bench warrant; (6) probation violation warrant in or out of state, or out-of-state parole warrant; (7) immigration warrant; (8) military warrant; (9) securing order; or (10) if there is an indication of an active warrant and the warrant has not been filed at the facility, the interviewer must contact the issuing agency to determine the status of the warrant. If no response is received within 30 days, the warrant will be considered inactive, and the prisoner will not be barred from temporary release. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(7)(i)(a)–(j).

66. You will be eligible, however, if the sentencing court has indicated in writing that there is no objection to your being in a temporary release program. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 1900.4(c)(7)(ii)(a)–(c).

67. Your interviewer must write to the correct court to make sure that the charge is still outstanding. If the court does not reply within thirty days, it will be assumed that the charge is no longer outstanding. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(7)(iii)(c).

68. ICE is the agency formally known as the Immigration and Naturalization Service or INS. ICE is the main investigative arm of the U.S. Department of Homeland Security and the second largest investigative agency in the federal government. It is mainly responsible for identifying, investigating, and getting rid of weaknesses having to do with the nation's border, economic, transportation, and infrastructure security. See the *JLM* Supplement on Immigration and Consular Access for more information on immigration agencies.

69. You will not be considered for temporary release if ICE shows: (1) that deportation proceedings are underway; (2) a show cause order for deportation has been issued; and (3) there is an actual ICE warrant on file. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(7)(iii)(d)(3). Your prison facility *must* write to ICE asking it about your alien status. If ICE does not respond within thirty days, your facility will assume that ICE does not plan to deport you. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(7)(iii)(d)(2).

70. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(6).

71. Serious bad behavior problems include all those that make you lose good-time credit, lead to being placed in special housing unit (“SHU”), or lead to being placed in keep lock for more than 30 days. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(8).

72. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(11)(iii).

73. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(13).

- (2) You do not do well in your program; or
- (3) If the TRC finds out something very negative about you.

If your conditional approval has been taken away, you may re-apply right away unless you have recently shown particularly bad behavior. In that case, you may not re-apply for eight weeks. If your eligibility for temporary release changes, your new application will be processed as if it were the first one you had submitted.<sup>74</sup>

If you are approved for a continuous temporary release program, you are also approved for all other temporary release programs at the will of the TRC and facility superintendent.<sup>75</sup> This means that if you have been approved for any continuous program (like a continuous educational release program) and you wish to do a different program, there is no formal way to change programs. Once you have been approved for one continuous release program, you may be eligible for a different one as long as the TRC and the superintendent agree.<sup>76</sup>

## D. How to Apply for Temporary Release Programs

### 1. Application Procedures

To participate in a temporary release program, ask your counselor or parole officer for information about the types of programs your facility offers and for a form called the "Notification to the TRC." When you complete this form, you must indicate the type of program to which you are applying and explain your reasons for applying. If you are physically unable to submit your application, the facility health services director or other staff person may submit the application for you.<sup>77</sup> You should be as specific as possible in explaining what type of release you are seeking and why that particular program fits your needs and qualifications. You should apply as early as possible because the application process takes a while.

Prisoners whose applications have been denied must wait at least eight weeks from the date their application is turned down before they can re-apply for the same type of release.<sup>78</sup> The eight-week waiting period does not apply to leaves of absence.<sup>79</sup>

### 2. How the Department Handles Applications

#### (a) The Point System

Unless you are a youthful offender (in which case the point system does not apply),<sup>80</sup> you must have a certain number of points to qualify for a particular program, even after you have met all the other requirements. The point system was developed to provide a standard way to measure your willingness to comply with the rules of temporary release. The system rewards good behavior in prison and in prison programs. It is also based in part on your criminal history and the crime for which you have been convicted. Still, if you have a good disciplinary record in prison, or if you are granted a temporary release and abide by the rules, your chances of getting a release in the future are better.

After you have filled out your application, it will go to an interviewer, who will score the application. There are eleven items in the point system scoring. Six are based on your criminal history, and five are based on your behavior while in prison.<sup>81</sup> At the end of Part D(2)(a) of this Chapter there is a chart that summarizes this point system and the points that may be gained or lost. You can use this chart to easily add up your score, but it is important to read through these more detailed explanations first because the chart does not include every detail. Pay special attention to the time periods applicable to each section, as some items extend as far back as ten years while others only apply to things that have happened in the last year. The more points you have, the better.

The items in the point system are scored as follows:

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- 74. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(d)(6).
  - 75. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(d)(9).
  - 76. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(d)(9).
  - 77. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(a).
  - 78. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(12).
  - 79. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(12).
  - 80. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(c)(13).
  - 81. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e).

(i) Criminal History<sup>82</sup>(1) Previous Sentences<sup>83</sup>

You will get one point (+1) if, in the ten years before you started your current sentence, you were not in prison at all because of a conviction. You will get zero points (0) if in the last ten years you were in prison for only misdemeanor or youthful offender convictions. You will lose one point (-1) if in the last ten years you were in prison because of a felony conviction. If you were sentenced to time served, this counts as incarceration after adjudication.

(2) Number of Felony Convictions<sup>84</sup>

If you were convicted of a felony before or during your current prison sentence, you will get fewer points, and it will be harder for your application to be approved. If the sentence you are serving is your only felony conviction in the last ten years, you will get two points (+2). If, during the last ten years, you were convicted of only one other felony, you will get zero points (0). If on top of your current conviction and that one other conviction, you have also been arrested for any other felonies, and those arrests have ended in conviction, even if you were convicted of these other felonies while you are serving your current sentence, you will lose two points (-2). If you have never previously been convicted of a felony and were convicted of your only felony during your current prison sentence, you will get zero points (0). If you were convicted of two or more felonies during your current prison sentence, you will lose two points (-2).

(3) Number of Misdemeanor Convictions<sup>85</sup>

If you were convicted of a misdemeanor before or during your current prison sentence, you will get fewer points, and it will be harder for your application to be approved. If you were not convicted of a misdemeanor in the last ten years, you will get one point (+1). If you were convicted of three or less than three misdemeanors in the last ten years, including the one you are serving time for now, you will get zero points (0). If you were convicted of four or more misdemeanors in the last ten years, including the one you are serving time for now, you will lose one point (-1). If you were convicted of your first misdemeanor during the sentence you are serving, you will get zero points (0).

(4) Outstanding Warrants<sup>86</sup>

If you have outstanding warrants, you will get fewer points, and it will be harder for your application to be approved. You will get two points (+2) if you have no outstanding warrants. You will get zero points (0) if you have one or more outstanding criminal warrants. A criminal warrant does not include alimony, child support, or a paternity warrant. If you can clearly show that the outstanding warrant against you was cleared because there was no evidence or there was a mistake, then that warrant will not count against you.

(5) Parole or Probation Violations<sup>87</sup>

If in the last ten years, or after you started your current prison sentence, your parole or probation was never revoked because of a technical violation or because you were arrested, you failed to report to your Parole Officer, or you moved without telling your Parole Officer (“abscondance”), you will get two points (+2). If your parole or probation was revoked one or more times, you will get zero points (0).

(6) Nature of Prior, Current, and Subsequent Convictions<sup>88</sup>

This category is about the kind of crimes you committed in the last ten years. The more serious the crime, the more points you will lose. If you are not in prison for any of the crimes listed below, you will get zero points (0). In this point system, attempted crimes are counted the same as completed crimes. If you

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82. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(1).

83. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(1)(i).

84. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(1)(ii).

85. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(1)(iii).

86. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(1)(iv).

87. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(1)(v).

88. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(1)(vi).

have been convicted of more than one of these crimes, you will be scored according to the most serious of them. If you also were convicted as a youthful offender, that conviction will not be included in the point score.

You will lose six points (-6) if you were convicted of any of the following crimes in the last ten years: murder—first or second degree; kidnapping—first or second degree; rape—first, second, or third degree; sodomy—first, second, or third degree; sexual abuse—first degree; incest; use of a child in sexual performance; or promoting a sexual performance by a child (including an obscene sexual performance).

You will lose four points (-4) if you were convicted of any of the following in the last ten years: assault—first degree; manslaughter—first or second degree; arson—first or second degree; burglary—first degree; robbery—first degree; sexual misconduct; sexual abuse—second or third degree; or endangering the welfare of a child.

You will lose two points (-2) if in the last ten years you were convicted of any of the following: criminal trespass—first degree; robbery—second or third degree; criminally negligent homicide; assault—second or third degree; possession of firearms and other dangerous weapons; menacing; reckless endangerment—first degree; unlawful imprisonment; coercion—first degree; riot—first degree; arson—third or fourth degree; vehicular assault; or vehicular manslaughter.

If you have been convicted of more than one of these crimes during the last ten years, then you will lose points only for the most serious one. So if you have been convicted of kidnapping (-6) and vehicular assault (-2), you will only lose six points (-6) in total.

#### (ii) Institutional Behavior<sup>89</sup>

Participation months are used to add up the score that describes your behavior in prison. A participation month is a thirty-day period of regular participation. The participation month only counts if you did it within the last two years before you apply for temporary release. Regular participation means that you are taking part in the activity at least once either in the morning, afternoon, or evening, for five days per week and for four weeks per month. The participation month must be in either a program or a work assignment, supervised by a certified instructor or teacher. If you are in involuntary protective custody (“IPC”), and you have no chance to do a work assignment or participate in any programs, you will get one point (+1) for every six months you spent in IPC during the last two years before you apply for temporary release.

##### (1) Program Participation I<sup>90</sup>

In this category, you can get as many as sixteen points (+16), but no more than sixteen points, for participating in programs and/or work assignments. For each three-month period, you can get one point (+1) for doing a work assignment and one point (+1) for doing a program, for a total of two points (+2) for the three months.

##### (2) Program Participation II<sup>91</sup>

In this category, you can get only one point (+1). You can only get this extra point if you have been in prison for longer than twenty-four months. You can get this extra point if you did a program or a work assignment for eight months in the twenty-five to thirty-six months leading up to your application for temporary release. In other words, you get up to sixteen points for the programs and/or work assignments you did in the two-years before you apply for temporary release (Program Participation I). You only get one extra point for anything you did before these two years (Program Participation II).

##### (3) Discipline I<sup>92</sup>

In this category, the longer you go with little or no disciplinary proceedings, the more points you get, and the more likely it is that your application will be approved. You can get no more than four points (+4) in this category. The disciplinary proceeding decisions that count against you in this section are if you lose your privileges for fourteen days or more, or if you are put into special housing or keeplock. Room and dorm restrictions count as keeplock. If you did not have any of these disciplinary proceeding decisions imposed on

89. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(2).

90. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(2)(i).

91. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(2)(ii).

92. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(2)(iii).

you in the last three months before you apply for temporary release, you will get one point (+1). If you had one or none of these disciplinary proceeding decisions in the last six months, you will get one point (+1). If you had two or fewer decisions in the last nine months, you will get one point (+1). If you had three or fewer decisions in the last twelve months, you will get one point (+1).

#### (4) Discipline II<sup>93</sup>

In this category, you can only get one point. You can get this extra point only if you have been in prison for longer than twenty-four months. If you had three or fewer disciplinary proceedings in the twelve to twenty-four months before your application, you get one point (+1). The types of disciplinary proceedings that count are the same as above.

#### (5) Temporary Release Record<sup>94</sup>

This section only applies if you were previously on temporary release. If you were convicted or arrested for a crime while on temporary release in the past year, you will lose six points (-6). If you were removed from work release or educational leave for disciplinary reasons other than re-arrest in the last year, you will lose three points (-3). If you were convicted or arrested while on temporary release in the twelve to twenty-four months before your application, you will lose three points (-3). If you returned late or under the influence of drugs or alcohol, or broke any temporary release program rules in the last six months, you will lose two points (-2). If you successfully finished your last temporary release and it was within the last year, you will gain two points (+2). If your two most recent releases in the last year were successful, you will get four points (+4).

You will get zero points (0) if: none of the above applies to you; your last release was over a year ago, or if it was an escorted or supervised group activity; or you have had your parole revoked since your last successful participation in temporary release.

Anyone found to be an absconder (failing to report or moving without telling your Parole Officer) will not be approved for temporary release.

#### (iii) Total Score<sup>95</sup>

After you have finished scoring, you should add twenty-six points (+26) to your score to make sure that your score is not negative.<sup>96</sup> You need thirty points (30) to participate in a short-term temporary release program.<sup>97</sup> You need thirty-two points (32) to participate in a continuous program.<sup>98</sup> So, while you could participate for one day in a community service program with a score of thirty, a score of thirty-two lets you participate on a daily basis.<sup>99</sup>

However, having the right number of points is only a requirement. Just because you have scored at least thirty points (30) does not mean that you automatically get the release. Having enough points only means that you can meet with the interviewer.<sup>100</sup>

#### (b) Point System Chart

As you go through this chart, write the points that apply to you in the right-hand column. Remember to refer back to the previous sections if you do not understand the short-hand explanations included here. This chart is meant to make the process of calculating your own score faster and easier. It is not suppose to replace the in-depth explanations in Part D(2)(a)(iv) and Part D(2)(a)(v) of this Chapter.

93. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(2)(iv).

94. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(2)(v).

95. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(3).

96. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e)(3)(i).

97. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a).

98. See N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.1(c), (d) (requiring 32 points for participation in community services leave program and industrial training leave program).

99. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.1(c).

100. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(f).

## (iv) Criminal History

	Possible Points available	Your Point subtotal per each category
<b>Previous Sentences</b> (last ten years only)		
No prior incarceration due to conviction	+1	
Prior incarceration due to misdemeanor or youthful offense only	0	
Incarcerated due to a felony conviction	-1	
<b>Number of Felony Convictions</b> (last ten years only)		
Current sentence is your only felony conviction	+2	
First felony conviction was for act committed during your current incarceration	0	
One previous felony conviction	0	
Two or more felony convictions	-2	
<b>Number of Misdemeanor Convictions</b> (last ten years only)		
No misdemeanor convictions	+1	
Three or fewer misdemeanor convictions, including your current sentence	0	
First misdemeanor conviction was for an act committed during your current incarceration	0	
Four or more misdemeanor convictions	-1	
<b>Outstanding Warrants</b>		
No outstanding warrants	+2	
One or more outstanding warrants	0	
<b>Previous Arrests</b> (last ten years only)		
You have never had parole or probation revoked due to re-arrest, absconding, or violating program rules	+2	
You have had parole or probation revoked one or more times	0	
<b>Nature of Convictions</b> (last ten years only; apply only the most severe)		
Convicted of murder (1 <sup>st</sup> or 2 <sup>nd</sup> degree), kidnapping (1 <sup>st</sup> or 2 <sup>nd</sup> degree), rape (1 <sup>st</sup> , 2 <sup>nd</sup> , or 3 <sup>rd</sup> degree), sodomy (1 <sup>st</sup> , 2 <sup>nd</sup> , or 3 <sup>rd</sup> degree), sexual abuse (1 <sup>st</sup> degree), incest, use of a child in a sexual performance, or promoting a sexual performance by a child (including an obscene sexual performance)	-6	
Convicted of assault (1 <sup>st</sup> degree), manslaughter (1 <sup>st</sup> or 2 <sup>nd</sup> degree), arson (1 <sup>st</sup> or 2 <sup>nd</sup> degree), burglary (1 <sup>st</sup> degree), robbery (1 <sup>st</sup> degree), sexual misconduct or sexual abuse (2 <sup>nd</sup> or 3 <sup>rd</sup> degree), or endangering the welfare of a child	-4	
Convicted of criminal trespass (1 <sup>st</sup> degree), robbery (2 <sup>nd</sup> or 3 <sup>rd</sup> degree), criminally negligent homicide, assault (2 <sup>nd</sup> or 3 <sup>rd</sup> degree), possession of firearms and other dangerous weapons, menacing, reckless endangerment (1 <sup>st</sup> degree), unlawful imprisonment, coercion (1 <sup>st</sup> degree), riot (1 <sup>st</sup> degree), arson (3 <sup>rd</sup> or 4 <sup>th</sup> degree), vehicular assault, or vehicular manslaughter	-2	
WRITE YOUR TOTAL HERE FOR (i) Criminal History:		

## (v) Institutional Behavior

<b>Program Participation I</b> (last two years only)	<b>Points Available</b>	<b>Your Points</b>
Each three-month period of participation in a work assignment (max. of +8)	+1	
Each three-month period of participation in a program (max. of +8)	+1	
Each six months in IPC in which you have not had the chance to participate in a program or work assignment (max. of +4)	+1	
<b>Program Participation II</b>		
Eight months of participation in a program or work assignment in the twenty-five to thirty-six month period prior to application	+1	
<b>Discipline I</b> (max. of +4)		
No disciplinary proceedings in the last three months	+1	
One or no disciplinary proceedings in the last six months	+1	
Two or fewer disciplinary proceedings in the last nine months	+1	
Three or fewer proceedings over the last twelve months	+1	
<b>Discipline II</b>		
Three or fewer disciplinary proceedings in the twelve to twenty-four months prior to application	+1	
<b>Temporary Release Record</b>		
Convicted or arrested for crime while on temporary release during the last year	-6	
Convicted or arrested for a crime while on temporary release during the twelve to twenty-four month period prior to application	-3	
Removed from work release or educational leave during the last year for other disciplinary reasons	-3	
Returned late or under the influence or violated any other temporary release rules within the last six months	-2	
Successfully completed your last temporary release within the last year	+2	
Successfully completed your last two temporary releases within the last year	+4	
None of the above apply	0	
WRITE YOUR TOTAL HERE FOR (ii) Institutional Behavior:		
GRAND TOTAL after combining (i) Criminal History; (ii) Institutional Behavior; and an additional +26 points:		

Once you have added up the scores from both the Criminal History and Institutional Behavior sections of the chart, add another twenty-six points (+26) to find your GRAND TOTAL score. Remember that short-release programs require thirty points (30), and continuous programs require a score of thirty-two points (32). Remember also that no score alone guarantees that your application will be granted.

## (c) Department Procedures for Considering Your Application

After scoring the application, the interviewer will conduct a preliminary review.<sup>101</sup> The interviewer will review the information in your application and determine if you are eligible based on your point score, your crime, and any other factors that were discussed in Part C above.<sup>102</sup> After the interview, you will have two work days to challenge the information used in the point score.<sup>103</sup> Once any challenges have been resolved, the interviewer will refer the scored application to the Temporary Release Committee (“TRC”) chairperson.<sup>104</sup> For further information on contesting scoring information, see Part E of this Chapter on appeals.

101. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(g).

102. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(b)–(c).

103. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(i).

104. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(i).

The TRC chairperson will review your file and check to see if you have either low-point status or are included in a special review category.<sup>105</sup> If you are considered a low-point prisoner, you may be considered for release by the TRC when one of the following conditions applies:

- (1) You have been given community preparation open date status by the parole board, and central office approval has been obtained;
- (2) You are a graduate of the shock incarceration program;
- (3) You are a graduate of the CASAT annex program; or
- (4) You are a first felony offender, who legally would have been eligible to get a sentence of probation instead of the sentence of imprisonment that was actually imposed.<sup>106</sup>

You will be notified of your official point score, the range into which it falls, and when you will appear before the TRC.<sup>107</sup> If you are in either the regular consideration or low-point range, the TRC will decide whether or not to approve your application.

If you receive a score of forty (40) or more, you will automatically receive furlough (temporary release) approval as long as:

- (1) You are not serving a sentence for a crime involving infliction of serious physical injury upon another, a sex offense involving forcible compulsion, or any other offense involving the use or threatened use of a deadly weapon;
- (2) You are not designated as a CMC (central monitoring case);
- (3) Yours is not a "low-O.D. case" (defined in Part D(2)(d) below); and
- (4) You are not in a special review category (see Part D(2)(d) below).<sup>108</sup>

Once your application has gone to the TRC and has been reviewed, the TRC will schedule a personal interview with you. After the committee members have met with you, they will approve or deny your application. A decision to approve must be supported by at least two of the three committee members. In making its decision, the TRC must look at your score on the eleven items in the point system, your interview, and the other factors used to evaluate prisoners, including recommendations of the professional staff. The committee can also consider aspects of your record that are not addressed by the point system, such as the quality of your performance in programs or on work assignment. In addition, the TRC must consider what it sees as your ability to benefit from participating in temporary release against any risk to the community or program from your participation.<sup>109</sup>

All applications for temporary release submitted to the TRC will be forwarded to the superintendent for review. Each application will be accompanied by either:

- (1) A statement of reasons for its denial by the TRC, or
- (2) A memo setting out the proposed temporary release program, stating the bounds of confinement, and including any other relevant information.

If the superintendent rejects the application or rejects the specific program that the TRC approved, he or she must give reasons for doing so in writing. You will get a copy of the reasons, and another copy will go to the Central Office for immediate review by the Commissioner. You will not have to make any other appeals. The Commissioner will inform you whether he accepts the superintendent's decision.<sup>110</sup> If you are denied, see Part E below for legal remedies that may be available to you.

#### (d) Applications that Require Central Office Approval

There are a number of categories of prisoners whose applications for temporary release must be reviewed and approved by the Central Office.<sup>111</sup> The first category that requires special approval is the statutory review category, which includes prisoners serving time for:

- (1) Possession, use, or threatened use of a weapon;

105. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(j).

106. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(j)(1)(i)-(iv).

107. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(k).

108. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(l)(1).

109. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(l)(2).

110. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(m)(1).

111. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(n).

- (2) A case resulting in prolonged physical injury, disability, or death of the victim; or
- (3) A sexual offense involving force.<sup>112</sup>

The second category of prisoners that requires special approval is “central monitoring cases” (“CMCs”). Generally, central monitoring cases are prisoners convicted of sophisticated or highly publicized criminal activity, whose release would pose special monitoring problems.<sup>113</sup> Prisoners held to be CMCs require approval of the Deputy Commissioner for correctional facilities.<sup>114</sup>

Prisoners considered to have a “low-O.D.” must also have the Commissioner approve their applications. Low-O.D. cases are those cases where prisoners receive the lowest point score possible, but are given an O.D. or community preparation open date status by the parole board. If the parole board has given you O.D. status, you will have a better chance of getting approval, even though your point score is the lowest possible.<sup>115</sup>

The fourth group of prisoners requiring Central Office approval is the Special Review category. This includes prisoners who have:

- (1) Any convictions for arson;
- (2) Any convictions for sex-related felonies;
- (3) Any convictions for conspiracy, criminal facilitation, or criminal solicitation in a statutory case;
- (4) Three or more felonies;
- (5) Any parole or temporary release violations;
- (6) A history of mental instability;
- (7) Any kidnapping convictions; or
- (8) Victim(s) or bystander(s) who required medical attention as a result of the instant offense.

If you fall into any of these categories, your chances of being granted temporary release are much lower. Your entire application must be re-reviewed by the Central Office and approved by both the Director of Temporary Release Programs and the Commissioner<sup>116</sup> (except for Special Review applications, which only need final approval from the Director of Temporary Release).<sup>117</sup> In general, the more people who review your application, the less likely you are to receive approval.

## **E. What to Do if Your Temporary Release Application Is Denied or Revoked**

### **1. Denial of Temporary Release**

#### **(a) Appeals Within the Department**

You can appeal your point score if the interviewer disqualified you because he added up your point score incorrectly, or if the information he used was wrong. You can also appeal the decision of the TRC or the decision of the Central Review Office. To appeal your point score or the TRC’s decision, you must submit Form 4145 and any other relevant information to the director of central office temporary release programs within ten working days of the date that the notice of denial of your application is sent. The director must receive your completed appeal within thirty days of the denial. If your appeal application is made within the thirty-day limit, the chairperson will send your appeal package to the Central Office, including any information not available in the Central Office files.<sup>118</sup> The Central Office reviewer will notify you and the TRC of his findings.<sup>119</sup>

If you think the disapproval by the Central Review Office was unfair or unreasonable, you may appeal the decision by applying to the Director of the Central Office to review your case. You should only do this when TRC accepted your application, but then the Central Office denies it. As explained in Part D(2)(b)

112. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(n)(1).

113. *See Pugliese v. Nelson*, 617 F.2d 916, 918–19 (2d Cir. 1980) (discussing central monitoring cases); *see also Smith v. Goord*, 43 A.D.3d 1236, 843 N.Y.S.2d 468 (3d Dept. 2007) (holding petitioner’s designation as CMC was not arbitrary or capricious based on the nature of his crimes because he was convicted of a robbery that involved a significant amount of cash).

114. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(n)(2).

115. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(j)(1)(i), (l)(1), (n)(3).

116. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 1900.4(n)(1)–(4).

117. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(n).

118. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(l)(5).

119. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.6.

above, all denials by the superintendent must be referred directly to the Central Office for an automatic Commissioner review. You do not have to do anything in this case.<sup>120</sup>

If the Deputy Commissioner or the Commissioner denies your application at any point in the proceeding, your administrative remedies are exhausted, and you cannot appeal this decision.<sup>121</sup> If your case has been designated a “central monitoring case” (“CMC”), you may only appeal by using existing departmental policy. CMC appeals are not handled by Central Office temporary release staff.<sup>122</sup>

You cannot re-apply for the same program until the appeals process on a prior application is complete. You may withdraw a pending appeal at any time.<sup>123</sup>

### (b) Other Forms of Review if Your Application is Denied

If your application is denied, you can appeal to the courts under Article 78 of the New York Civil Practice Law and Rules (“C.P.L.R.”). See *JLM*, Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules” for guidance on appealing. However, New York courts have addressed this question often and now apply a test that makes it difficult for a claim to be successful. In *Grant v. Temporary Release Committee*, the court said that because participation in temporary release programs is a privilege and not a right, courts will only look at claims where either the temporary release committee violated a statutory requirement (such as failing to give you an interview if you have the right amount of points, or failing to inform you of the committee’s decision), or if the committee’s decision was affected by “irrationality, bordering on impropriety.”<sup>124</sup> Because the TRC has such enormous discretionary power, it is very difficult to convince a court that its decision was irrational and unfair. The TRC only has to say that it thinks you might pose a threat to society, or that it does not think you will work hard, and the court will accept its findings. You also do not have the right to challenge the legislature or executive’s decision to make you ineligible for temporary release based upon the crime for which you were convicted, if you have not yet participated in the program.<sup>125</sup>

However, it is possible to win, as seen in *Lopez v. Coughlin*.<sup>126</sup> In that case, an HIV-positive prisoner applied for work release. The TRC approved the application because the facility doctor, who was familiar with the prisoner’s condition, said his medical condition would not affect his ability to be on temporary release. The Central Office reversed and denied the application solely on the basis of the prisoner’s condition. The Albany County Supreme Court held that this was completely irrational since the doctor had already given his approval for temporary release. The court said that the Central Office’s findings “were based on generalizations and possibly inaccurate assumptions” and ordered the TRC to reevaluate its decision.<sup>127</sup>

## 2. Revocation of Temporary Release

### (a) How Your Temporary Release Can Be Revoked

Your temporary release may be suspended or revoked by the superintendent or director of your correctional institution upon recommendation of the TRC or the Commissioner of the Department of

120. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.6(a)(2), (c).

121. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.6(c).

122. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.6(e).

123. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.6(f).

124. *Grant v. Temp. Release Comm.*, 209 A.D.2d 617, 617, 619 N.Y.S.2d 106, 106 (2d Dept. 1994) (citing *Young v. Temporary Release Comm.*, 122 A.D.2d 606, 606, 505 N.Y.S.2d 279, 280 (4th Dept. 1986)).

125. *See Lee v. Governor of New York*, 87 F.3d 55, 59–60 (2d Cir. 1996) (finding no constitutional violation when the class of prisoners excluded from participation in programs based on their crime was expanded to include petitioners while they were incarcerated); *see also Romer v. Morgenthau*, 119 F.Supp.2d 346, 358 (S.D.N.Y. 2000) (holding that prisoner did not have a liberty interest in participating in work release programs); *Cody v. Pataki*, 24 A.D.3d 1058, 1059, 805 N.Y.S.2d 726 (3d Dept. 2005) (holding that prisoners have no right to compel Commissioner of Correctional Services to provide temporary release program).

126. *Lopez v. Coughlin*, 139 Misc.2d 851, 529 N.Y.S.2d 247 (Sup. Ct. Albany County 1988); *see also Flaherty v. Coughlin*, 713 F.2d 10, 14 (2d Cir. 1983) (reversing dismissal of prisoner’s claim because evidence suggested he may have been denied temporary release privileges in retaliation for filing a class action lawsuit challenging state prison policies).

127. *Lopez v. Coughlin*, 139 Misc.2d 851, 854, 529 N.Y.S.2d 247, 249 (Sup. Ct. Albany County 1988).

Corrections and Community Supervision.<sup>128</sup> This suspension or revocation can be made at any time if the Superintendent or Director has information that:

- (1) Your continued participation in the program is not in the interest of community safety *or* goes against your best interests; or
- (2) There is a substantial likelihood that you cannot successfully complete the temporary release program.<sup>129</sup>

Some factors that will be considered indicators that you are unsuited for temporary release include:

- (1) Arrests and/or convictions for crimes committed while participating in the program;
- (2) Absconding, or attempting to abscond, from the program;
- (3) Violations of departmental, institutional, or temporary release program rules;
- (4) Threats made by you against yourself or others;
- (5) Threats made against you that require protective custody;
- (6) Changes in your physical or mental status that result in your inability to successfully complete the program;
- (7) Poor attitude on your part as shown by a failure to participate successfully;
- (8) Your lack of motivation;
- (9) Significant change in employment or student status;
- (10) Failure to get a job six weeks after orientation in a work release program;
- (11) Your refusal to repay the advance;
- (12) Your refusal to repay the weekly work release charge;
- (13) You have outstanding warrants or your immigration status changes;
- (14) Your presence in the community places you at risk.<sup>130</sup>

Any employee of the Department of Corrections and Community Supervision who is assigned to the facility of your confinement and has firsthand knowledge of your unsatisfactory or worsening progress in the temporary release program can help remove you from the program. The employee who thinks you are not doing well in your program may file a written statement to the Chairperson of the facility's TRC, requesting the Temporary Release Committee to review your unsatisfactory or deteriorating adjustment to the temporary release program. The TRC will then evaluate your progress.<sup>131</sup> If you have not yet been transferred from the temporary release facility because of disciplinary problems, the TRC will make a recommendation to the superintendent on whether you should continue in temporary release.<sup>132</sup> The superintendent will then either approve or reject the recommendation of the TRC. If the superintendent approves the recommendation of removal from the program, your temporary release participation privilege is revoked.<sup>133</sup>

If your unsatisfactory progress appears to be caused by departmental, institutional, or temporary release rule violations, these rule violations must be referred to in either a disciplinary hearing or a superintendent's hearing. If you do something to be considered a security risk, you can be transferred to a more secure facility before the TRC has time to review the complaint.<sup>134</sup>

If a temporary release participant is charged with misbehavior, the hearing disposition cannot recommend removal from the temporary release program as a disciplinary penalty. The TRC cannot use a report as a reason for recommending that you be removed from a temporary release program unless you are found guilty at a disciplinary hearing.<sup>135</sup>

#### (b) How to Appeal a Revocation of Your Temporary Release

Once you have been granted the privilege of participating in temporary release, you have a constitutionally protected interest in ensuring that your liberty is not deprived and that you are not

128. N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.1(a).

129. N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.1(b).

130. N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.1(c)(1)–(14).

131. N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.2(a).

132. N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.2(a).

133. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 1904.2(i)–(k).

134. For a list of factors that are considered security risks, see N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.2(c).

135. N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.2(g).

re-incarcerated without fair procedures. That is, if you have not violated any rules, and your temporary release is still revoked, you may be protected under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution or, under the state laws governing your confinement. Due Process, under the Fourteenth Amendment, means that the government must follow certain procedures—including giving you notice and an opportunity to be heard—before it can take away your liberty earned through the temporary release program. You can be removed from the program only if the facility's temporary release administrators follow the required procedures. Note, however, that the Supreme Court's decision in *Sandin v. Conner* makes it rather difficult for you to prove that your removal from the program has caused you harm that is "atypical" of what you should expect as a prisoner.<sup>136</sup> The Second Circuit has held that removal from temporary release programs and work release programs are liberty interests protected by the U.S. Constitution for New York State prisoners.<sup>137</sup>

Unfortunately, the regulations governing temporary release leave much discretion to the facility's temporary release administrators. They will be able to make many decisions as they see fit. These decisions will stand as long as they are considered fair and impartial. If your temporary release is denied, you will only be entitled to the minimum due process requirements. The Dutchess County Supreme Court stated in *Roman v. Ternullo* that correctional facility superintendents were required to extend the procedural due process safeguards outlined by the Supreme Court in *Wolff v. McDonnell* and discussed in detail in the New York Code.<sup>138</sup> These requirements include a hearing, an electronic recording of the hearing, prior notice of the hearing, and a written statement of the decision made and the reasons relied on at the hearing.<sup>139</sup> If you are in a special housing unit or keeplock, there are also provisions made to assist you in your defense.<sup>140</sup> At the hearing, you are able to call witnesses, produce evidence and may be able to cross-examine adverse witnesses.<sup>141</sup> The Second Circuit has applied the due process requirements set out by the Supreme Court to release revocation hearings.<sup>142</sup> These requirements include:

- (1) written notice of the claimed violations of parole;
- (2) disclosure to the parolee of evidence against you;
- (3) opportunity to be heard in person and to present evidence;
- (4) the right to confront and cross-examine adverse witnesses;
- (5) a "neutral and detached" hearing body such as a traditional parole board; and

136. *Sandin v. Conner*, 515 U.S. 472, 486–87, 115 S. Ct. 2293, 2301–02, 132 L. Ed. 2d 418, 431–32 (1995) (holding that a prisoner is not deprived of a liberty interest when he is removed from the general prison population and placed in segregated confinement for 30 days because discretionary discipline by prison officials in response to misconduct falls within the expected boundaries of the prisoner's sentence).

137. *See Anderson v. Recore*, 446 F.3d 324, 328 (2d Cir. 2006) (holding that a prisoner has a liberty interest in continuing his participation in his temporary release program); *Friedl v. City of New York*, 210 F.3d 79, 84–85 (2d Cir. 2000) (holding that due process protections apply to the revocation of work release participation); *Gutierrez v. Joy*, 502 F. Supp. 2d 352, 357 (S.D.N.Y. 2007) (affirming that the Second Circuit recognizes that due process protects the liberty interest in continued participation in temporary release programs).

138. *Roman v. Ternullo*, 81 Misc. 2d 1023, 1024–25, 367 N.Y.S.2d 197, 198 (Sup. Ct. Dutchess Cnty. 1975); *Wolff v. McDonnell*, 418 U.S. 539, 563–66, 94 S. Ct. 2963, 2978–80, 41 L. Ed. 2d 935, 955–57 (1974); *see also* *Marciano v. Goord*, 38 A.D.3d 217, 218, 830 N.Y.S.2d 552, 553 (1st Dept. 2007) (discussing a prisoner's due process rights and the requirements for removal of a prisoner from a temporary release program, including requirements of prior hearing, notice, and opportunity to be heard); *MacCowan v. Cummings*, 99 Misc. 2d 914, 916–917, 417 N.Y.S.2d 366, 367–68 (Sup. Ct. Orleans Cnty. 1978) (holding that "any removal [of the prisoner] from the [work release] program should be as a result of a hearing following the rationale and procedures set forth in *Wolff v. McDonnell*"). *See JLM*, Chapter 32, "Parole," for a more detailed explanation of the due process rights guaranteed under *Wolff*. The U.S. Supreme Court has also held that due process requires certain procedural protections for prisoners participating in a state-created pre-parole conditional supervision program. *See Young v. Harper*, 520 U.S. 143, 146–47, 117 S. Ct. 1148, 1151, 137 L. Ed. 2d 270, 276 (1997).

139. N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.2(h) (2013).

140. N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.2(h) (2013).

141. N.Y. Comp. Codes R. & Regs. tit. 7, § 1904.2(h)(5) (2013).

142. *Friedl v. City of New York*, 210 F.3d 79, 84–85 (2d Cir. 2000) (noting that the due process requirements of *Morrissey* have been extended to revocation of probation and loss of good-time credits and therefore should be extended to work release revocation (*citing Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972))); *Kroemer v. Joy*, 2 Misc. 3d 265, 268, 769 N.Y.S.2d 357, 360 (Sup. Ct. Yates Cnty. 2003) (applying the procedural due process requirements of *Morrissey*, including the right to confront adverse witnesses, to a Temporary Release Program revocation hearing).

(6) a written statement by the fact-finders as to the evidence relied on and their reasons for revoking parole.<sup>143</sup>

However, in order to succeed on appeal, you *must* be able to prove that the wrong conclusion was reached in your TRC hearing and that the procedure was incorrect.<sup>144</sup>

If you believe your rights have been violated in a revocation of temporary release, you can file a lawsuit. In order to do this, you must base your complaint on a particular statute or law that will give a judge power to hear how the prison authorities have treated you. If you are in New York, there are two different ways that you can do this: (1) Article 78 of the New York Civil Practice Law and Rules (called Article 78 of the C.P.L.R.) in New York state courts, or (2) 42 U.S.C. § 1983 (called Section 1983) in *either* state or federal court. Both of these statutes will be explained in further detail below.

(i) Article 78 of the C.P.L.R.

If you think that prison officials used either improper procedures or obviously incorrect information in deciding your case, you should bring a state court proceeding under Article 78 of the New York Civil Practice Law and Rules. Bringing a state court action can have advantages over a federal action because it is easier for a state court judge to order a state agency to correct its actions than it is for a federal court judge to do the same. This is the most common and best way to fight to get reinstated in a temporary release program. If you choose to proceed under Article 78, however, you will not be awarded money damages. Something else to keep in mind is that Article 78 claims are less complicated than federal Section 1983 claims. If you are going to file *pro se* (without a lawyer), Article 78 proceedings will be much easier for you to file than the complicated federal court procedure needed for a Section 1983 claim. For more information on Article 78 proceedings, see *JLM*, Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules.” If you are not in New York, you should research any similar statutes in your state.

(ii) Section 1983<sup>145</sup>

Your second option is to bring a claim under 42 U.S.C. § 1983 (“Section 1983”). This claim can only be used if a right protected by the Constitution or an officer or agent of the government violates a federal statute.<sup>146</sup> Section 1983 allows you to be awarded money damages if you win your case. Remember that you must first try the prison’s administrative remedies before using Section 1983.<sup>147</sup> Section 1983 can also be used only if you are not asking to be released completely from prison. Even if you are on temporary release, you are still considered to be in prison. Please see *JLM* Chapter 16 on using Section 1983, as well as *JLM* Chapter 14 on the Prison Reform Litigation Act (“PLRA”), for more information. Remember, however, that the court pays strong deference to the TRC. The TRC is given substantial discretion to strike “unsuitable” prisoners from the temporary release program. As long as the TRC follows procedural due process guidelines (as outlined in *Wolff*<sup>148</sup>) and its decision is found to be rational, the courts will not overturn its decision.

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143. *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

144. *See Roucchio v. Coughlin*, 29 F. Supp. 2d 72, 79–80 (E.D.N.Y. 1998) (holding that a due process claim for damages was not valid when the inmate failed to show that his removal from the work release program was invalidated).

145. If you would like to file a § 1983 claim, read Chapter 14 of the *JLM*, which discusses the Prison Litigation Reform Act (“PLRA”). Under the PLRA, prisoners must satisfy certain requirements before filing § 1983 actions in federal court. For more information about § 1983 claims, see *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.”

146. Please note that some officials cannot be sued under § 1983. See *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law” for more information.

147. *See Hill v. Chalanor*, 419 F. Supp. 2d 255, 257 (N.D.N.Y. 2006) (holding that no action challenging prison conditions can be brought under federal law by a prisoner until all available administrative remedies are exhausted); *Francis v. Zavadill*, No. 06 Civ. 249 (SAS), 2006 U.S. Dist. LEXIS 79323, at \*13 (S.D.N.Y. Oct. 30, 2006) (*unpublished*) (“Failure to exhaust is an absolute bar to an inmate’s action in federal court.”); *Garcia v. Payne*, 97 Civ. 0880 (DAB), 1998 U.S. Dist. LEXIS 1274, at \* 9–10 (S.D.N.Y. Feb. 6, 1998) (*unpublished*) (dismissing prisoner’s claims for the failure to pursue state remedies prior to filing).

148. *Wolff v. McDonnell*, 418 U.S. 539, 563–66, 94 S. Ct. 2963, 2978–80, 41 L. Ed. 2d 935, 955–57 (1974).

## F. The Second Chance Act of 2007 and Federal Bureau of Prisons Temporary Release Programs

The Second Chance Act of 2007<sup>149</sup> made some important changes to temporary release programs. It expanded the types of opportunities available to prisoners upon release, improved upon the existing programs in prisons, and modified how prisoners can serve sentences in community facilities. It allows for government agencies and nonprofit groups to receive grants of money from the federal government in order “to assist offenders re-entering the community from incarceration to establish a self-sustaining and law-abiding life by providing sufficient transitional services.”<sup>150</sup> However, these agencies and groups must apply for the money to receive it and must also comply with certain requirements in order to be selected to receive the grant money.<sup>151</sup> This section will discuss, as established by the Second Chance Act, (1) The Federal Prisoner Reentry Program and Services, (2) Drug Treatment Programs, and (3) Alternatives to Incarceration.

### 1. Federal Prisoner Reentry Program and Services

The Second Chance Act established a federal prisoner reentry program under the Bureau of Prisons to help you adjust to life outside prison.<sup>152</sup> This program is meant to provide you with information regarding health and nutrition, employment, literacy and education, personal finance and consumer skills, community resources, personal growth and development, as well as release requirements and procedures.<sup>153</sup> Once you are released, the Re-entry Courts, at the state and local level, will monitor you and help you access support programs. Such programs include drug and health counseling, case management, and “any other service or support needed for reentry,” after your release.<sup>154</sup> Nonprofit organizations may also provide programs to help you after your release. If you have never been convicted of a violent or sex-related crime, you may be eligible for programs that give you mentoring, job training, and job placement services for the first 180 days after your release.<sup>155</sup> There may also be mentoring programs run by nonprofit organizations (as opposed to the state or the Bureau of Prisons itself) available to you during your incarceration.<sup>156</sup> These mentoring programs can give you mentoring services, services to help you transition to life after your release, and training regarding offender and victim issues.<sup>157</sup> These services take place during or shortly after your imprisonment.<sup>158</sup> The Second Chance Act requires that the Bureau of Prisons allow anyone who provided you with mentoring services during your incarceration to continue those services after your release.<sup>159</sup> Remember, it is not yet clear which nonprofit organizations or government agencies will be receiving grant money and how the programs will function.

Before you leave prison, the Bureau of Prisons is required to help you prepare for your release. The Bureau of Prisons is required to ensure your eligibility for state and federal benefits such as Social Security, Medicare, Medicaid, and Veterans benefits, and to support parent-child relationships. Where the law permits, the Bureau must also help you secure those benefits for which you are eligible prior to release.<sup>160</sup> For the three years before you are released from prison, you may have access to programs that would train you for technology-based jobs and careers.<sup>161</sup> Earlier in your incarceration the Bureau of Prisons is required, if it has enough funding, to offer a program to assess your skill level in various areas. It also is required to help you to improve in certain areas, including academic, health, and interpersonal skills.<sup>162</sup> It will determine whether you have any special reentry needs and help you maintain relationships with your family

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149. Second Chance Act, Pub. L. No. 110-199, (codified at 42 U.S.C. § 17501 (2012)).

150. 42 U.S.C. § 17501 (2012).

151. 42 U.S.C. § 3797w (2012).

152. 42 U.S.C. § 17541 (2012).

153. 18 U.S.C. § 4042(a) (2012).

154. 42 U.S.C. § 3797w(f)(3)(C) (2012).

155. 42 U.S.C. § 17532(a) (2012).

156. 42 U.S.C. § 17531(a)–(b) (2012).

157. 42 U.S.C. § 17531(a)–(b) (2012).

158. 42 U.S.C. § 17531(a)–(b) (2012).

159. 42 U.S.C. § 17533(a) (2012).

160. 18 U.S.C. § 4042(a)(6) (2012).

161. 42 U.S.C. § 17511(b) (2012).

162. 42 U.S.C. § 17541 (2012).

and children during your imprisonment.<sup>163</sup> This program will also help you obtain an official form of photo identification, a social security card, and/or a birth certificate as your release nears.<sup>164</sup>

## 2. Drug Treatment Programs

The Second Chance Act allows state and local prosecutors to set up full drug-treatment programs as an alternative to imprisonment.<sup>165</sup> Depending on what state you are in, there may be Demonstration Drug Treatment Programs at which you can get treatment for drug dependence or addiction.<sup>166</sup> These programs would basically let you enter a drug treatment program rather than staying in prison. To be eligible, you must meet certain requirements, including never having been charged with or convicted of an offense during which you possessed or used a dangerous weapon, or during which you used force against another person; you also must be officially determined to need drug or alcohol addiction treatment.<sup>167</sup> If you are in a community confinement center rather than a regular prison, the Bureau of Prisons is required to ensure that you have any necessary medical care, mental health care, and medicine.<sup>168</sup>

The Second Chance Act provides for Prison-Based Family Treatment Programs.<sup>169</sup> To be eligible for a Prison-Based Family Treatment Program, you must have a child under 18 years of age and you must have been convicted of a nonviolent drug-related felony.<sup>170</sup> These programs require that you serve your term in prison, and they provide substance-abuse treatment, family counseling, legal services, medical care, nursery and preschool, parenting skills training, pediatric care, and other services.<sup>171</sup> The Second Chance Act also changed the Residential Substance Abuse Treatment for State Offenders Program (“RSAT”), which provides drug treatment in a facility set apart from the general prison population.<sup>172</sup> If you are involved in an RSAT program, the state may be required to give you a wide range of support services after your release from prison, including case management services.<sup>173</sup>

## 3. Alternatives to Incarceration

Though you do not have an absolute right to do so, you may be able to spend some or all of the last twelve months of your sentence in a community confinement facility, or under other conditions that help you adjust to release.<sup>174</sup> You also may be able to spend six months or ten percent of your sentence, whichever is shorter, in home confinement.<sup>175</sup> Courts, however, are not allowed to require or guarantee that your sentence be served in a civil confinement facility. Therefore, only the Bureau of Prisons can make this decision.<sup>176</sup> Again, it is unclear how this will work in practice.

## G. Conclusion

Each temporary release program has its own set of requirements for eligibility, as well as many different rules for participating. The law treats participation in these programs as a privilege, not a right. The Department of Corrections and Community Supervision is not required to create release programs, and the eligibility and approval rules are strict. The Constitution protects you against discrimination or an unfair denial of access to temporary release. This protection does not mean that you *must* be allowed to participate. Instead, it means that the temporary release officials must show that they have good cause for not allowing you to participate or for removing you from participation. The officials must also conform to standards of due

163. 42 U.S.C. § 17541 (2012).

164. 42 U.S.C. § 17541 (2012).

165. 42 U.S.C. § 3797q(a) (2012).

166. 42 U.S.C. § 17521(a)–(b) (2012).

167. 42 U.S.C. § 3797q-6 (2012).

168. 18 U.S.C. § 3621(g) (2012).

169. 42 U.S.C. § 3797s-6(3) (2012).

170. 42 U.S.C. § 3797s-6(1) (2012).

171. 42 U.S.C. § 3797s-6(3) (2012).

172. 18 U.S.C. § 3621(e)(1)–(e)(5)(A) (2012).

173. 18 U.S.C. § 3621(e)(1)–(e)(5)(A) (2012).

174. 18 U.S.C. § 3624(c)(1) (2012).

175. 18 U.S.C. § 3624(c)(2) (2012).

176. *See* 18 U.S.C. § 3621(b) (2012) (“The Bureau of Prisons shall designate the place of the prisoner’s imprisonment.”).

process, which the New York courts have ordered them to provide in cases such as *Roman v. Ternullo*.<sup>177</sup> However, because your participation is deemed a privilege and not a right, it is very difficult to successfully appeal a decision regarding a temporary release program.

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177. *Roman v. Ternullo*, 81 Misc. 2d 1023, 1025, 367 N.Y.S.2d 197, 198 (Sup. Ct. Dutchess County 1975).